No. 93-1900

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EVA HARPER,

Petitioner,

v.

R. DEAN HARMAN and
LYNN HARMAN a/k/a LYNN MEID,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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June 24, 1994

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QUESTIONS PRESENTED

1. Does a judgment corrected under Federal Rules of Civil Procedure 60(a) extend the time to appeal as running from the corrected judgment?

2. Where a party files an untimely motion under Rule 59(e), may the court under Rule 60(a) or 60(b), extend the time in which to file a Rule 59(e) motion?

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No. 93-1900

IN THE

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OCTOBER TERM, 1993

EVA HARPER,

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R. DEAN HARMAN and
LYNN HARMAN a/k/a LYNN MEID,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondents R. DEAN HARMAN and LYNN HARMAN, a/k/a LYNN MEID (hereinafter referrect to collectively as "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari pending in this matter.

STATEMENT OF THE CASE

Plaintiffs, R. DEAN HARMAN and LYNN HARMAN, filed a complaint against EVA and BRAINARD HARPER on June 13, 1984, alleging violation of Federal Securities Laws and State Law claims. An Amended Complaint was filed on July 13, 1984.

The bench trial commenced on October 9, 1985, and continued on various dates until its conclusion on January 23, 1986. Judgment was entered on July 25, 1986, awarding general and punitive damages against the Harpers.

The Harpers filed a motion for a new trial which was denied on December 2, 1986. On November 14, 1986, the Harpers filed a premature Notice of Appeal and thereafter, on January 2, 1987, filed a timely Notice of Appeal.

On August 21, 1990, the Ninth Circuit Court of Appeals rendered its opinion dismissing the claims against Brainard Harper and essentially affirming the fraud judgment against Eva Harper in most of the transactions and remanded to the District Court for a recalculation of the general and punitive damage awards.

The District Court required the parties to submit briefs on the recalculation of general and punitive damages and conducted several hearings thereon. On January 14, 1992, the District Court filed its Order Awarding Damages, and on February 27, 1992, filed the Amended Judgment After Remand.

On March 3, 1992, the Harmans gave the Harpers Notice of Entry of Judgment. On March 16, 1992, Harper filed a Motion for New Trial or Amendment of Judgment. Harman filed opposition to the motion on March 31, 1992, on the grounds that the motion was not

timely served. Harpers thereafter filed a motion for relief from default which was later denied.

On May 18, 1992, the District Court filed its Order Correcting Judgment Entered, February 27, 1992, Denying Motion for Relief From Judgment; Denying Motion to Amend Judgment.

On June 17, 1992, Harper filed a Notice of Appeal, purporting to appeal from the "final judgment entered in this action on the 18th day of May, 1992, and from the Order Denying Motion for Relief from Judgment and Denying Motion to Amend Judgment.

Harman made a Motion in the Court of Appeals to dismiss the appeal on the grounds that the final judgment was entered on February 27, 1992, not May 18, 1992 and that the Harper's untimely filing of a Federal Rule of Civil Procedure 59(e) motion did not extent the time for filing an appeal.

The Ninth Circuit Court of Appeals filed its opinion on November 1, 1993, affirming the District Court's order correcting the remand judgment pursuant to Rule 60(a); denying Harper's motion for Rule 60(b) relief, and dismissing the appeal from the underlying judgment.

Harper filed a motion for rehearing which was denied on February 28, 1994. Harper filed the instant Petition for Writ of Certiorari on May 27, 1994.

The Case had now been in the Federal Court system for 10 years.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS WAS AN AFFIRMATION OF THE DISTRICT COURT JUDGE'S APPLICATION OF THE RULES OF CIVIL PROCEDURE AND IS NOT OF SUCH SPECIAL IMPORTANCE AS TO REQUIRE REVIEW BY THE HIGHEST COURT OF OUR LAND.

The decision of the Ninth Circuit Court of Appeals is in harmony and not in conflict with the decisions of this Court and other Federal Appellate Courts as to the application of Federal Rules of Civil Procedure.

The uncertainty that Petitioner claims exists as to when a judgment is a judgment for purposes of the time to appeal is inventive and not supported by Federal Rules or case law.

The questions presented by Petitioner to this Court deal with the routine application of Federal Rules of Civil Procedure 59(e)[1], 60(a)[2] and 60(b).[3] Very simply stated, Petitioner filed a motion under Rule 59(e) to amend the judgment within 14 days instead of 10 days as required by the Rule. When Respondent pointed out the untimeliness of the motion, Petitioner filed a motion under Rule 60(b) seeking the same Rule 59(e) relief on the grounds of "excusable neglect." The District Court denied Petitioner's 59(e) motion as untimely, and denied the Rule 60(b) motion on the grounds that Rule 60(b)(1)

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[1] Motion to Alter or Amend a Judgment.

[2] Relief From Judgment or Order; Clerical Mistake.

[3] Relief From Judgment or Order; Mistake; Inadvertence, Excusable Neglect, etc.

was not intended to include events which affect only the date a Rule 59(e) motion is filed, and that Petitioner's neglect was not excusable because prior to the Court signing the Judgment, the Petitioner had at least four weeks notice of the contents of the proposed judgment, having received a copy thereof, and did nothing during this interim period to advise the Court of any objections that Petitioner may have had with the contents of the judgment.[4] The Petitioner made no objections to the proposed judgment and only made an untimely attempt to have the judgment amended after it was entered by the Court. The District Court, in its Order Correcting Judgment Entered February 27, 1992; etc., made it very clear that, "Even if the Court were to consider Defendant's motion, they would be denied."

In addition to late filing of the Rule 59(e) motion, Petitioner also filed a late appeal of the underlying judgment.

The Ninth Circuit Court of Appeals affirmed the District Court as to the denial of relief under Rule 59(e), and stated that even though Petitioner had abandoned the appeal as to the Rule 60(b) relief by not briefing the issue, the District Court was correct and did not abuse its discretion. The Appellate Court also dismissed Petitioner's appeal from the underlying judgment as being untimely, and on the further basis that an appeal from denial of Rule 60(b) relief does not bring the entire underlying judgment up for review, citing, *Browder v. Direction, Dept. of Corrections,* 434 U.S. 257, 263 n.7

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[4]The Court stated that it withheld signing the proposed judgment for four weeks in order to give Petitioner an opportunity to object. (Petitioner's Appendix Exhibit "A" to Petition for Writ of Certiorari).

(1978); *Feister v. Turner,* 783 F.2d 1474, 1476 (9th Cir. 1986).[5]

This Court, in *Appalachian Power Co. v. American Institute of Certified Public Accountants,* 80 S.Ct. 16, 4 L.Ed.2d 30 (U.S.N.Y. 1959), stated that (Ordinarily, application by Federal district court of Rules of Civil Procedure when affirmed by Court of Appeals, will not be reviewed by Supreme Court on Certiorari, particularly where question is one that concerns judgment of district Judge in relation to a particular set of facts).

In the instant case, the district judge exercised his independent judgment in relation to the facts surrounding the ruling of the Rule 59(e) and 60(b) motion, and in so doing denied the motions. The Court of Appeals affirmed the District Court's action, and this Court should now apply the principle set forth in *Appalachian Power Co.* and deny Petitioner's Petition for Writ of Certiorari.

II.

A SUFFICIENT STANDARD EXISTS AS TO WHEN A JUDGMENT IS A JUDGMENT FOR PURPOSE OF RUNNING OF THE TIME FOR APPEAL.

Federal Rule of Civil Procedure 58 provides:

> Rule 58, **Entry of Judgment**
>
> Subject to the provisions of Rule 54(b):
> (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a

[5]Petitioner's Exhibit "D" of the Appendix to Petition for Writ of Certiorari omitted a vital last page of the Opinion of the Ninth Circuit Court of Appeals. A complete copy of said Opinion is appended hereto as Exhibit "A".

> sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

It appears sufficiently clear that a judgment is a judgment for purposes of running of the time for appeal when it is set forth on a separate document and entered in the docket by the clerk. However, Rule 58 does not require the district court to enter a separate document whenever it amends, remits, or in any way alters a judgment that has already been entered once in accordance with Rule 58[6]. *Wright v. Preferred Research, Inc.*,

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[6] A judgment conforming to Rule 58 was entered on February 27, 1992 (See Petitioner's Exhibit "A" to Petition for Writ of Certiorari). On May 18, 1992, the court "corrected" its judg-

[footnote continued]

937 F.2d 1556 (C.C. 11 (Ala.) 1991), certiorari denied 112 S.Ct. 915, 116 L.Ed.2d 815. On the other hand, the time to appeal from a judgment is extended until after a determination of *timely* filed motion for new trial or motion to alter or amend a judgment.[7]

The courts have been consistent in holding that the ten day limit in which to file a Rule 59 motion is jurisdictional and if filed later, does not extend the time in which to appeal.

In *Scutieri v. Estate of Revitz,* 829 F.Supp. 387 (S.D. Fla. 1993) it was held that the time periods for filing Rule 59 motions were mandatory and jurisdictional[8].

And, in *Textile Banking Co. Inc. v. Rentschler,* 657 F.2d 844 (C.A. 11, 1981) the court held that a district court lacks power to extend the 10 day filing deadline imposed on motions to alter or amend a judgment[9].

In the case at bar, Petitioner filed a Rule 59 motion four days beyond the time limit and such motion was denied by the court. As a result, Petitioner's time to appeal was not extended and a notice of appeal was required to be filed within 30 days of the underlying judgment entered on February 27, 1992. (*Seshachalam v. Creighton University School of Medicine,* 545 F.2d 1147 (C.A. Neb. 1976), *Martin v. Wainwright,*

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ment by an order entered in the docket (See Petitioner's Exhibit "B" to Petition for Writ of Certiorari).

[7]See *Conerly v. Flower,* 410 F.2d 941 (C.A. Ark. 1969).

[8]See also *Cole v. Altiere,* 534 F. Supp. 165 (D.C. Pa. 1981); *Gribble v. Harris,* 625 F.2d 1173 (5th Cir. 1986, *United States v. Hall,* 463 F. Supp. 787, 791 (1983).

[9]See also *Scola v. Boat Frances, R., Ins.,* 618 F.2d 147, 152 n.2 (1st Cir. 1980).

469 F.2d 1072 (C.A. Fla. 1972). Petitioner's appeal was not taken until June 17, 1992 and was from the order correcting the underlying judgment.

Petitioner argues that when the district court corrected the February 27, 1992 judgment pursuant to Rule 60(a) due to the Court's oversight in not recalculating one of the punitive damage awards, a new judgment was created and the time for appeal ran from the order correcting judgment entered on May 18, 1992.

This argument is without merit in view of the cases holding otherwise:

Blanton v. Anzalone, 813 F.2d 1574 (9th Cir. 1987) (The error may be considered "clerical" even if the judge himself was responsible for it)[10].

Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110 at 117 (3rd Cir. 1987) (this provision has been utilized by the court to correct damage awards)[11].

In Re Cobb, 750 F.2d 477, 479 (5th Cir. 1985) (Corrections under Rule 60(a) do not affect the underlying judgment, and consistent therewith, do not affect the time for filing a notice of appeal).

International Controls Corp. v. Vesco, 556 F.2d 665, 670 (2d Cir. 1977) cert. denied, 434 U.S. 1014 (1978) (The grant of a Rule 60(a) motion does not lead to relief from the underlying judgment).

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[10]See also *McNickle v. Bankers Life Insurance Co.,* 888 F.2d 678 (10th Cir. 1989) and *In Re Jee,* 799 F.2d 532 (9th Cir. 1986).

[11]See also *Barris v. Bob's Drag Chutes,* 717 F.2d 52 (3rd Cir. 1983) and *Hayden v. Scott Aviation,* 684 F.2d 270 (3rd Cir. 1982).

United States v. 1,431,80 Acres of Land, 466 F.2d 820 (8th Cir. 1972) (The entry of an order correcting a clerical mistake pursuant to Rule 60(a) does not start the time for appeal running again. *Liberman v. Gulf Oil Corp.,* 315 F.2d 403, 404 (2nd Cir.) cert denied, 375 U.S. 823, 84 S.Ct. 72, 11 L.Ed.2d 56 (1963).

There are cases which indicate that an order "amending" the judgment results in a new judgment (*Ray v. United States,* 121 F.2d 416 (C.A. 7th 1941); *County of Imperial v. U.S.,* 348 F.2d 904 (C.A. 7th 1965).

And, in *Bank of America v. Arthur Andersen,* 709 F.2d 1174 (C.A. 7th 1983) it was held that the fact an order correcting or clarifying, rather than amending or altering the original judgment is not controlling.

The true test as to whether a Rule 60(a) correction results in a new judgment should be resolved by the question: "What did the court intend at the time judgment was rendered?" If the court intended something other than was stated, then a correction to conform to the court's intent should not result in a new judgment. However, if the court intended what is contained in the judgment and later utilizes Rule 60(a) to change its mind, then a new judgment results and the time for appeal starts anew. This was substantially the holding in *Blankenship v. Royalty Holding Co.,* 202 F.2d 77 (C.A. Okl. 1953)[12] and provides an adequate standard as to when a judgment is a judgment for purposes of the time for appeal.

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[12]See also *Knox v. Lichtenstein,* 654 F.2d 19, rehearing denied and clarified 661 F.2d 693.

III.

RELIEF UNDER RULE 60(b) IS NOT SUCH A RESERVOIR OF EQUITABLE RELIEF AS TO ECCUSE THE UNTIMELY FILING OF A RULE 59(e) MOTION.

Petitioner's Motion for Relief from Default[13] filed April 14, 1992, states: ". . . EVA HARPER and BRAINARD HARPER will move the court for a motion for relief from default pursuant to Federal Rules of Civil Procedure §60 . . .," and continues, "This motion will be made on the grounds that failure to file defendant's motion for new trial or for amendment of the judgment was due to excusable neglect of defendant's attorney."

It is abundantly clear that Petitioner's motion was only asking the court to excuse the later filing of her Rule 59(e) motion based upon her attorney's excusable neglect. After the district court denied Petitioner's Rule 59(e) motion as untimely, and refused to grant relief from such untimely filing under Rule 60(b)(1), there was nothing further before the court, because the Petitioner did not seek Rule 59(e) relief under her Rule 60(b) motion.

The distinction between Rule 50 and 60 was explained in *Summers Bkrtcy.*, 150 B.R. 129 (M.D. Pa. 1993).

> Distinction between motion filed under rule concerning new trials and amending of judgments as opposed to motion filed under rule concerning relief from judgment or order based on mistake or excusable neglect is that under first rule, motion must be served in timely fashion; if that service is timely, debtor has potential to invoke either of the rules and remedies contemplated therein.

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[13] Exhibit "B" of Appendix to Opposition to Writ of Certiorari.

Petitioner additionally asserts that Rule 60(b)(6) has been described as a "reservoir of equitable powers" to do justice in a particular case. Petitioner never filed a motion under Rule 60(b)(6), nor could she have. Notwithstanding, Petitioner was asserting excusable neglect as a basis for relief from default under Rule 60(b)(1), and therefore, she could not utilize Rule 60(b)(6) as another means for relief. As held in *Matter of Emergency Beacon Corp.*, 666 F.2d 754 (C.A.N.Y. 1981), (Relief from judgment under subd. (b)(6) of this rule providing relief for "any other reason justifying relief" is not available under this rule unless the asserted grounds for relief are not encompassed within any of the first five clauses of subd. (b) of this rule). Even if Petitioner had been able to file a motion under Rule 60(b)(6), she would have had to show extrordinary circumstances in order to obtain such relief. *Scola v. Boat Frances R., Inc.*, 618 F.2d 146, 155 (1st Cir. 1090), Rule 60(b)(6) does not confer a standardless residual discretionary power to set aside judgments; Rule 60(b)(6) relief available only in cases evidencing extraordinary circumstances; improper to grant Rule 60(b)(6) relief if aggrieved party could reasonably have sought the same relief on appeal.

On page 25 of Petitioner's Petition for Writ of Certiorari, Petitioner asks this court to make it clear that Rule 60(b) is indeed a reservoir for equitable relief by holding that a court may consider the merits of a Rule 59 motion under Rule 60(b) or Rule 60(a) where the requirements of these latter rules are met.

Even if this court chose to do so, Petitioner would be in no better position. Petitioner's Rule 60 motion *only* asked the district court to "excuse" her late filing

of the Rule 59(e) motion, and when the court denied that motion, there was nothing before the court by which it could siphon its reservoir of equitable relief.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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June 24, 1994

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

R. DEAN HARMAN,
Plaintiff-Appellee,
v.
EVA HARPER,
Defendant-Appellant.

No. 92-16156
D.C. No. CV-84-20377-SW
OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Submitted October 19, 1993*
San Francisco, California

Filed November 1, 1993

Before: Procter Hug, Jr., Mary M. Schroeder, and William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

SUMMARY

Civil Litigation and Procedure/Appeals

The court of appeals affirmed in part a district court order. The court held that a district court's modification of a damages award on its own motion did not start anew the time period during which the defendant could file appeals from the

*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

judgment, when the modification was favorable to that defendant.

Appellee R. Harman and Lynn Harman sued appellant Eva Harper, Brainard Harper, and Harper Realty, Inc., alleging violations of securities laws and torts. The district court awarded the plaintiffs judgment for compensatory and punitive damages. The court of appeals affirmed in part, reversed in part, and remanded for a recalculation of damages. The district court recalculated damages, and entered judgment against Eva Harper on February 27, 1992.

Eva Harper filed a Rule 59(e) motion for a new trial or amendment of judgment after the ten-day period for filing the motion had expired. The district court denied the motion as untimely. No notice of appeal was filed within the time permitted for appeal from the February 27, 1992 judgment.

On May 18, 1992, the district court, on its own motion under Rule 60(a), ordered its earlier judgment to be corrected due to the court's oversight in calculating the punitive damages award to one plaintiff.

Eva Harper filed a notice of appeal from the May 18, 1992 "final judgment." She contended that the merits of the entire judgment were properly appealable, and that the court's modification of the remand judgment went beyond the correction of a ministerial mistake, and consequently could not be a Rule 60(a) correction. Harman moved to dismiss the appeal as untimely.

[1] Harper's appeal must fail. If the district court properly acted under Rule 60(a) in modifying the judgment, then the correction did not start a new appeal time running. Therefore, Harper's appeal of the original remand judgment would be untimely. [2] If the district court's modification of the original remand judgment went beyond the limits of Rule 60(a), it would amount to a grant of Rule 60(b) relief. Because the dis-

trict court's modification only reduced the punitive damages award against Harper, such an amendment could not possibly subject the entire original judgment to a new opportunity for Harper to appeal. [3] Harper's attempt to appeal the underlying remand judgment accordingly fails.

COUNSEL

James F. Matthews, Matthews, Boehm & Hammon, San Jose, California, for the defendant-appellant.

Diana E. Hoffman, John Kazubowski, Hoffman & Kazubowski, San Jose, California, for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Defendant Eva Harper appeals an order of the district court correcting an earlier judgment and denying Rule 60(b) relief from that judgment. Insofar as Harper's appeal challenges the earlier judgment, entered after remand from this court, we dismiss the appeal. To the extent that the judgment challenges the denial of Rule 60(b) relief, we affirm.

FACTS

This action was originally brought by Dean and Lynn Harman against Eva and Brainard Harper, and Harper Realty, Inc. The complaint alleged violations of state and federal securities laws, as well as state-law torts of fraud and misrepresentation. After a bench trial, the district court awarded plaintiffs judgment for compensatory and punitive damages on several counts, along with attorneys' fees. On appeal, we affirmed in part, reversed in part, and remanded for a recalculation of

damages. *Harman v. Harper*, No. 86-2916 (9th Cir. Aug. 21, 1990)(amended memorandum). The only claims that survived for purposes of remand were state-law claims against Eva Harper.

On remand, the district court recalculated damages and entered judgment against Eva Harper on February 27, 1992. On March 16, 1992, Eva Harper filed a Rule 59(e) motion for new trial or amendment of judgment. That motion was filed four days after the expiration of the ten-day period specified by Rule 59 for the filing of such a motion; the district court denied it as untimely. No notice of appeal had been filed at that time, nor was any notice filed within the time permitted for appeal from the judgment entered on February 27, 1992.

On May 18, 1992, Eva Harper filed a motion under Rule 60(b) seeking the same relief sought in her untimely Rule 59(e) motion. Her counsel argued that he should be forgiven his untimeliness in bringing the prior motion because of the death of his father-in-law. The district court denied relief, stating that it had no power to extend the 10-day period for bringing a Rule 59(e) motion, and that it would not permit a Rule 60(b) motion to be used to revive or do service for a Rule 59(e) motion.

On its own motion, however, the district court ordered its earlier judgment to be corrected. The court stated that, "due to an oversight on the part of the Court," the punitive damage award to one of the plaintiffs had not been reduced to reflect a reduction in the compensatory damages on remand. The court, stating that it acted to correct an oversight pursuant to Rule 60(a), ordered the clerk to correct the earlier judgment by reducing an award of $100,000 punitive damages to $63,221.82, thereby maintaining proportionality between the compensatory and punitive awards.

On June 17, 1992, Eva Harper filed a notice of appeal from

"the final judgment entered" on May 18, 1992,[1] and from the denial of Rule 60(b) relief on that same date.

The Harmans moved to dismiss the appeal as untimely. A motions panel referred that motion to this panel, and briefing on the merits was completed. Eva Harper has filed briefs challenging the award of damages against her on remand; she contends that the merits of the entire judgment are properly appealable pursuant to her notice of appeal of June 17, 1992. We disagree.

APPEAL FROM THE JUDGMENT

The district court stated that it was correcting its judgment pursuant to Fed. R. Civ. P. 60(a). So long as the court's correction was intended to conform the judgment to the original intention of the court, the invocation of Rule 60(a) was proper. *See Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1445 (9th Cir. 1990) (court may amend order canceling trademark to add two additional trademarks; "[a] district court judge may properly invoke Rule 60(a) to make a judgment reflect the actual intentions and necessary implications of the court's decision."); *Jones & Guerrero Co., Inc. v. Sealift Pacific*, 650 F.2d 1072 (9th Cir. 1981) (district court properly invoked Rule 60(a) to amend order dismissing case against Guerrero since it never intended to do so; Rule 60(b) inapplicable). *See also Blanton v. Anzalone*, 813 F.2d 1574, 1577 n. 3 (9th Cir. 1987) (invoking Rule 60(a) to delete an award of prejudgment interest):

[1]In fact, no corrected judgment had been entered; only the court's correction order had been filed. That fact does not affect the validity of this appeal, however. "[A]n order amending a final judgment is an appealable final order. . . ." *Bank of California v. Arthur Andersen & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983); *see also Shay v. Agricultural Stabilization and Conservation State Committee for Arizona*, 299 F.2d 516, 524 (9th Cir. 1962) (order denying Rule 60(b) motion is appealable).

> The basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas the latter consist of instances where the court changes its mind. . . .

[1] Harper contends that the court's modification went beyond the mere correction of a ministerial mistake, and consequently cannot be a Rule 60(a) correction. We need not decide that question, however, for Harper's appeal must fail either way. If the district court properly acted under Rule 60(a), then the correction did not start a new appeal time running. *See In re Cobb*, 750 F.2d 477, 479 (5th Cir. 1985) ("Corrections under Rule 60(a) do not affect the underlying judgment, and, consistent therewith, do not affect the time for filing a notice of appeal.") (citation omitted); *see also International Controls Corp. v. Vesco*, 556 F.2d 665, 670 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (same); *United States v. 1,431.80 Acres of Land*, 466 F.2d 820, 822 (8th Cir. 1972) (same); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152 n.2 (1st Cir. 1980)(same). The time for Harper to appeal the original remand judgment therefore expired 30 days after entry of the original remand judgment on February 27, 1992. Fed. R. App. P. 4(a)(1). Harper's appeal of the original remand judgment is therefore untimely.

[2] If, on the other hand, the district court's modification of the original remand judgment went beyond the limits of Rule 60(a), it would amount to a grant of Rule 60(b) relief. *See Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 645 (9th Cir. 1984) ("error regarding the legal effect of [stipulated judgment] was one of law and therefore [could] be corrected only under Rule 60(b)"). In that event, Harper is no better off. The only modification that the district court made to its earlier judgment was favorable to Harper; it reduced the punitive damages award against her. That amendment cannot possibly subject the entire original judgment to a new opportunity for Harper to appeal.

> [Statutes that limit appellate jurisdiction to review within a prescribed period] are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered *which is of no import to the matters to be dealt with on review.*

Federal Trade Comm'n v. Minneapolis-Honeywell Co., 344 U.S. 206, 213 (1952) (emphasis added); *see also Buggs v. Elgin, Joliet & Eastern Ry. Co.*, 852 F.2d 318, 323 (7th Cir. 1988) (Rule 60(b) amendment does not open original judgment to new appeal when the amendment creates no new incentive to appeal original judgment). The only issue presented by Harper's appeal from the court's amending order is the validity of the amendment itself. *See Buggs*, 852 F.2d at 323.

Harper does not attack, of course, the district court's exercise of discretion in correcting the judgment to Harper's advantage. Instead, she attempts to attack the underlying judgment, which is not the subject of this appeal from the grant of Rule 60(b) relief.

[3] Harper's attempt to appeal the underlying remand judgment accordingly fails, whether the district court modified its judgment pursuant to Rule 60(a) or Rule 60(b). Insofar as her appeal attacks the underlying judgment, it is dismissed.

APPEAL FROM DENIAL OF RULE 60(b) RELIEF

Harper's notice of appeal indicated that she appealed in part from the denial of her motion for Rule 60(b) relief. We review an appeal from the denial of Rule 60(b) relief for an abuse of discretion in denying the motion; the appeal does not bring the entire underlying judgment up for review. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978); *Feister v. Turner*, 783 F.2d 1474, 1476 (9th Cir. 1986).

Harper's motion in the district court asked that she be relieved from the consequences of the late filing of her Rule 59(e) motion. The district court denied relief on the ground, among others, that it had no power to extend the time limit for filing a Rule 59(e) motion.

Harper has apparently abandoned her appeal of the denial of Rule 60(b) relief, because she has not briefed the issue; she only challenges the underlying judgment. In any event, the district court was correct; it had no power to extend the time for filing a Rule 59(e) motion. *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984). The district court certainly did not abuse its discretion in denying the requested relief.

CONCLUSION

Harper's appeal of the underlying judgment is dismissed for lack of jurisdiction. The district court's order amending the remand judgment and denying Harper's motion for Rule 60(b) relief is affirmed. Costs in favor of appellee.

DISMISSED IN PART; AFFIRMED IN PART.

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APPENDIX B

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Attorney for Defendants
EVA HARPER and BRAINARD HARPER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-84020377-SW

R. DEAN HARMAN and LYNN HARMAN,

Plaintiffs,

v.

EVA HARPER, et al.,

Defendants.

MOTION FOR RELIEF FROM DEFAULT [RULE 60]

Date: May 13, 1992
Time: 10:00 AM
Dept: Honorable Spencer Williams

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 13, 1992, at 10:00 a.m., or as soon thereafter as the matter may be hears, before the Honorable Spencer Williams in the above court, located at 280 S. First Street, San Jose, California, defendants, EVA HARPER and BRAINARD HARPER will move the court for a motion for relief from default pursuant to Federal Rule of Civil Procedure §60, in failing to timely file their motion for new trial or for amendment of the judgment.

This motion will be made on the grounds that failure to file defendants' motion for new trial or for amendment of the judgment was due to excusable neglect of defendants' attorney. The motion is based upon the points and authorities and declaration of James F. Matthews submitted herewith and upon the files, pleadings and records herein and in the appellate court.

Dated: April 13, 1992.

/s/ James F. Matthews
JAMES F. MATTHEWS
Attorney for Defendants